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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GAIL M. McMAHON, Plaintiff and Appellant, v. DIANE CRAIG et al., Defendants and Respondents.	G040324 (Super. Ct. No. 06CC03530) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING; NO CHANGE IN JUDGMENT

It is ordered that the opinion filed herein on July 31, 2009, be modified as follows:

1. After the first full paragraph on page 11, insert the following two new paragraphs:

McMahon also relies on *Erlich v. Menezes* (1999) 21 Cal.4th 543 (*Erlich*) to support her direct victim theory. There, the California Supreme Court held that the negligent performance of a commercial contract does not entitle a plaintiff to recover emotional distress damages. (*Id.* at p. 558.) An exception to this general rule occurs "when the express object of the contract is the mental and emotional well-being of one of the contracting

parties . . . ." (*Id.* at p. 559.) McMahon contends defendants undertook a duty to protect her emotional health when they agreed to provide veterinary care to Tootsie after learning of McMahon's special bond to her dog. We disagree.

The contract between McMahon and defendants to treat Tootsie did not by itself demonstrate defendants undertook a duty to protect McMahon's mental and emotional tranquility. (Cf. *Selden v. Dinner* (1993) 17 Cal.App.4th 166, 175-176 [duty to protect patient's emotional health does not arise by virtue of physician-patient relationship].) Nor did McMahon's description to defendants of her close relationship to Tootsie establish that defendants agreed to protect McMahon's emotional well-being as part of the contract to provide veterinary services for her dog. *Gonzales v. Personal Storage, Inc.* (1997) 56 Cal.App.4th 464 illustrates the point. There, the plaintiff explained when leasing storage space that she would be storing rare furniture, keepsakes, heirlooms, and other personal items. (*Id.* at p. 469.) Plaintiff sued the storage company for emotional distress when it negligently allowed another party to abscond with her property, arguing the company breached a contractual duty to protect her emotional well-being. The appellate court rejected this argument, holding that the landlord-tenant relationship between the plaintiff and the storage company did not give rise to a duty to protect plaintiff's emotional tranquility. (*Id.* at p. 474.) Similarly, McMahon's description of her close relationship to Tootsie did not make her emotional tranquility an object of the contract when defendants agreed to treat Tootsie. As *Erlich* explains, a more explicit undertaking by defendants is required to impose liability for negligent infliction of emotional distress. (*Erlich, supra,* 21 Cal.4th at p. 559.)

2. On page 14, first sentence of the first full paragraph, delete the word "increase" and replace it with "cover-up" and also delete the word "coverage" so the sentence now reads:

> "McMahon contends, however, that defendants' attempts to cover-up their malpractice constitutes . . . ."

3. On page 15, second sentence of the second full paragraph, delete the number "10" and replace it with "several" so the sentence reads:

> There, the defendant's false statements misled the plaintiff into several days of fruitless searching for his dogs.

4. On page 16, first sentence of the first full paragraph, beginning "Because defendants' alleged acts" is deleted and the following sentence is inserted in its place:

> Because defendants' alleged acts were neither done in her presence nor directed at McMahon as necessary to support a claim for intentional infliction for emotional distress, nor does the alleged cover-up rise to the extremity required in *Cochran*, we conclude the trial court did not err in sustaining demurrers to this cause of action.

These modifications do not change the judgment. The petition for rehearing is DENIED.

ARONSON, J.

WE CONCUR:

O'LEARY, ACTING P. J.

FYBEL, J.